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NORTH CAROLINA'S NEW INTESTATE SUCCESSION ACT*

I

ITS HISTORY AND PHILOSOPHY

FREDERICK B. McCALL†

At long last the General Assembly of North Carolina has acted to free the state from the shackles of its ancient, outmoded, obsolescent, and, in many cases, eminently unfair laws governing the descent and distribution of the property of a person who dies intestate. An entirely new Intestate Succession Act became effective on July 1, 1960—applicable, however, only to estates of persons dying on or after that date. As a result of this legislation the devolution of a decedent's property will be governed by a plan that is modern and up to date in every respect, and, it is hoped, more consonant with his desires had he made a will.

The crying need for a new intestate succession law becomes more apparent when one realizes that, with but slight modification in the law, the descent of real property to the heirs of a deceased person was determined by canons of descent¹ enacted in 1808; and that our separate statute governing the distribution of personal property, with some legislative changes made from time to time, bore a striking resemblance to its English prototype—the Statute of Distributions,² enacted in 1670. In addition, North Carolina was one of the few remaining states in this country which retained the old marital life estates of dower and curtesy as the share of the surviving spouse in the decedent spouse's estate. These estates were a part of our common law inheritance from England which abolished them in 1925³

Perhaps it will be of some interest to recount, briefly, the history of the struggle to bring about the revision and modernization of North Carolina's intestate succession laws. Twenty-six years ago changes in these laws were first advocated by the present writer and Mr. Allen Langston in an article, published in the *North Carolina Law Review*, entitled "A New Intestate Succession Statute for North Carolina."⁴

* This article consists of three papers presented at the Fall, 1960, Institute on The New Intestate Succession Act, sponsored by the North Carolina Bar Association. The editors of the *Review* wish to express their appreciation to the Bar Association for its authorization to publish these papers.

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¹ N.C. Laws 1808, ch. 4.

² 1670, 22 & 23 Car. 2, c. 10.

³ Administration of Estates Act, 1925, 15 Geo. 5, c. 23.

⁴ 11 N.C.L. Rev. 266 (1933).

In that article it was pointed out that in North Carolina intestate property was being disposed of by medievalistic laws long since outmoded; and therein a new intestate succession statute, modeled along the lines of modernized statutes in other states, was proposed. As a result of this groundwork, the General Assembly of 1935 authorized the creation of a commission to make a study of the existing laws relating to intestate estates, wills, the administration of estates, and the duties and powers of fiduciaries for the purpose of revising and modernizing such laws. The commission was also charged with the duty of drafting appropriate statutes for presentation to the legislature. A nine-man commission, with Senator Carl L. Bailey as chairman, was appointed by Governor Ehringhaus to undertake this task. Appointed by the Governor to serve on the commission were the following persons: Professors R. B. White of Wake Forest College, David F. Cavers of Duke University, and Fred B. McCall of the University of North Carolina; and Messrs. A. Wayland Cook of Greensboro, Jones Fuller of Durham, Silas G. Bernard of Asheville, Joseph B. Cheshire, Jr., of Raleigh, and Lawrence Watt of Winston-Salem. Later W. E. Church, Clerk of Superior Court for Forsyth County, was added to the commission; and Professor Malcolm McDermott of Duke was appointed to take the place of Professor Cavers who resigned following his appointment to a professorship in the Harvard Law School. This commission made reports to the Governor in 1937 and in 1939 and drafted for introduction in the 1939 General Assembly a bill consisting of 195 pages to re-write completely the law of intestate succession, administration of estates, wills, and guardianships. This voluminous bill was given serious consideration by the legislature but, after having passed the Senate, failed of enactment by a single vote in the House of Representatives. In its forward-looking proposals for changes in the North Carolina law, the commission's report is said by legal scholars to have been twenty years ahead of its time.

Although legislative activity in this connection remained dormant for nearly twenty years, several former members of the commission, including Forsyth County Clerk of Court William E. Church and Professors Malcolm McDermott of Duke University and Fred B. McCall of the University of North Carolina, persisted in their efforts to bring about a revision of North Carolina's antiquated intestacy statutes. The inadequacy and unfairness of these laws were dinned, perhaps *ad nauseam*, into the ears of law students, of members of civic clubs and women's clubs, and of anyone else who would listen.

In 1957 the General Assembly appropriated some \$2,500 to the General Statutes Commission for the express purpose of making a study of and recommending changes in the laws relating to intestate succes-

sion. Early in that year this distinguished Commission, under the Chairmanship of Mr. Robert F. Moseley of Greensboro, undertook the revision of these statutes. The Commission appointed Professors Norman A. Wiggins of the Wake Forest School of Law, W. Bryan Bolich of the Duke University Law School, and Fred B. McCall of the University of North Carolina Law School to serve as a special committee to draft a proposed new Intestate Succession Act for North Carolina. This drafting committee entered upon its work in the latter part of the year 1957.

In order to familiarize itself with modern legislative trends, this committee studied carefully the laws of England and of many of the American states which have revised and brought up to date, in the light of changing social and economic conditions, their laws of intestate succession. Especially helpful to it in the formulation of a new law was the Model Probate Code, the 1939 study made by the Commission on the Revision of the Laws of North Carolina Relating to Estates, and one recently made on the subject by Professor Wiggins while doing graduate work at Columbia University. Of course as much of the then present North Carolina law as the committee deemed worthy of retention was retained as a framework upon which to hang the proposed new law.

After nearly a year's work this committee in the fall of 1958 submitted a tentative draft of a statute to the General Statutes Commission for its consideration. Thereafter, for a period of over three months the committee met regularly with the Commission, which studied and analyzed word by word the proposed new law. A number of minor changes in the committee's recommendations were made by the Commission; but the major changes in the law urged by the committee, after presentation of arguments by its members in their behalf, were accepted by the Commission. As a result of these combined efforts, extending over a period of nearly two years, there evolved a proposed new Intestate Succession Act which was placed in bill form and introduced in the 1959 General Assembly in the Senate by Senator William Medford and in the House by Representative Tim Valentine. After several weeks of dedicated study by the House and Senate Judiciary Committees and their sub-committees, the statute proposed by the General Statutes Commission—with some fairly minor changes made therein by the legislature—was enacted into law, effective July 1, 1960.

A history of the new law would not be complete without mentioning the very fine work done in connection with its drafting and enactment by Mr. Thomas L. Young, then Revisor of Statutes, or the excellent article written by feature writer Chester S. Davis of the *Winston-Salem Journal and Sentinel*, entitled "Where There's a Will There's a Better

Way," in which article, widely circulated while the legislature was in session, Mr. Davis dramatically pointed out the inequities of estate distribution under the old law and discussed the major changes proposed by the General Statutes Commission. Without doubt this article created a climate of public opinion favorable to the enactment of the new law.

We shall now consider the important changes made in the old law and the philosophy and reasons upon which these changes were predicated.

CERTAIN DISTINCTIONS AS TO INTESTATE SUCCESSION ABOLISHED

If we first look at new G.S. § 29-3 we find some sweeping changes made in the law as it stood prior to July 1, 1960. Section 29-3 provides that

In the determination of those persons who take upon intestate succession there is no distinction:

- (1) Between real and personal property, or
- (2) Between ancestral and non-ancestral property, or
- (3) Between relations of the whole blood and those of the half-blood.

In the determination of those persons who take upon intestate succession, this section abolishes the distinction between real and personal property and facilitates the harmonization of the rules of succession into one uniform system with but one class of heirs entitled to take both kinds of property; and it further eliminates consideration of whether the decedent's property was ancestral or non-ancestral or those taking it were of the whole blood or half-blood insofar as intestate succession is concerned. As we shall see, all of these changes are reflective of modern trends.

No Distinction Between Real and Personal Property

Specifically, the section first abolishes the separate statutes for the descent of real property⁵ and for the distribution of personal property.⁶ Thus, in 1959 North Carolina finally joined "the movement towards an elimination of the English difference between the descent of land and the distribution of personalty [which] began very early in the American Colonial period"—1639 in Connecticut; 1655 in Massachusetts.⁷ Curiously enough North Carolina had clung tenaciously to the

⁵ N.C. GEN. STAT. § 29-1 (1950) [N.C. Laws 1784, ch. 204, § 2, as amended].

⁶ N.C. GEN. STAT. § 28-149 (1950) [N.C. Pub. Laws 1868-69, ch. 113, § 53, as amended, N.C. Pub. Laws 1893, ch. 82, as amended, N.C. Pub. Laws 1913, ch. 166, as amended, N.C. Pub. Laws 1915, ch. 37, as amended, N.C. Pub. Laws 1921, ch. 54, as amended, N.C. Pub. Laws 1927, ch. 231, as amended, N.C. Sess. Laws 1945, ch. 46, as amended, N.C. Sess. Laws 1947, ch. 879].

⁷ 6 POWELL, REAL PROPERTY 619 (1958).

different systems though the historically based reasons for their difference have long since ceased to exist. The plan of inheritance of realty came through the feudal law of England and was designed to support and defend the feudal economy; that of the distribution of personalty came from the Roman law and was administered by the Ecclesiastical Courts of England. Nevertheless until July 1, 1960, the land of a person who died intestate before that date descended to one group of heirs in certain proportions according to our Canons of Descent—almost literally unchanged since 1808, while his personal property was distributed to another group, consisting of his next of kin, in perhaps different proportions according to the rules of our Statute of Distributions—a direct descendant of the 1670 English statute of the same name. The illogicality of making the right of inheritance depend upon the *nature* of the property owned by the decedent at the time of his death has been removed by the new law. As Professor Powell well says:⁸ "There is no good reason for giving a spouse a life interest in the asset if it be land, but an absolute outright interest if it be personalty." In departing from the duality of the old English law North Carolina now has one system which follows the American trend of distributing both kinds of property to the same persons and in the same proportions, thus generally following the historic rules for the distribution of *personalty*. In the United States only Tennessee⁹ and Delaware¹⁰ now retain separate statutes of descent and distribution. .

No Distinction Between Ancestral and Non-Ancestral Property

Secondly, for the purpose of determining those who shall take intestate property no longer is there to be any distinction between ancestral and non-ancestral property. Up until the effective date of the new law North Carolina was one of four states in this country which still retained fully in force the ancestral property rule.¹¹ England, from whence the notion came that descent must be traced from the first purchaser, abolished all distinction between ancestral and non-ancestral property by the English Law of Property Act of 1925.¹² The doctrine originated in the common law rule of descent that only those collaterals who were of the blood of the first purchaser of the land could inherit. The common law of descent inquired into the source of the intestate's

⁸ 6 POWELL, *op. cit. supra* note 7, at 621. For an excellent discussion of intestate succession in all its phases, including its historical and philosophical background, see 6 POWELL, *op. cit. supra*, 606.

⁹ TENN. CODE ANN. §§ 31-101, -201 (1955).

¹⁰ DEL. CODE ANN. tit. 12, §§ 502, 512 (1953).

¹¹ ARK. STAT. ANN. § 61-110 (1955); DEL. CODE ANN. tit. 12, § 502 (1953); N.C. GEN. STAT. § 29-1 (1950) [N.C. Laws 1784, ch. 204, § 2, as amended]; TENN. CODE ANN. § 31-101 (1955).

¹² 15 Geo. 5, c. 20. See Administration of Estates Act, 1925, 15 Geo. 5, c. 23, which was an adjunct of the Law of Property Act.

title in order to return the land in the event of failure of lineal descendants, to the relatives of the person who first brought it into the family. This doctrine was formerly enunciated in G.S. § 29-1, Rule 4, which in effect provided that on failure of lineal descendants, where the inheritance has been transmitted by *descent* from the ancestor, or has been derived by *purchase* (i.e., by will, gift, or settlement and hence the complications of the Doctrine of Worthier Title) from the ancestor by one who in the event of the ancestor's death would have been his heir or one of his heirs, the collateral relatives who inherit the estate must be of the blood of the first purchaser, through whatever *intermediate* devolution by descent, gift, or devise it may have passed, and however remote it may be from the first ancestor.¹³ There were two exceptions to the North Carolina rule: (a) where property had not been so transmitted, or if so, the blood of the ancestor was extinct, the collateral kin inherited regardless of the ancestral property doctrine;¹⁴ and (b) surviving parents took from the decedent who died without leaving issue or brothers or sisters or their issue, even though the parents were not of the blood of the ancestor from whom the land descended.¹⁵ These laws, combining out-dated principles with problems which engender litigation for their construction, are eliminated by the new law. That "purchased property"—whatever that means—should go to one set of heirs while "ancestral or descended property"—whatever that means—should go to another set can hardly be justified if it be admitted that the purpose of the law should be simply to carry an intestate's property to those closest to him in an effort to provide for those who probably would have been the objects of his bounty had he expressed his wishes in the matter. The effect of the new law is to cause all property to pass according to one common rule whatever its character and from whatever source derived. This is in keeping with the modern trend.

No Distinction Between Relations of the Whole Blood and Those of the Half-Blood

Closely bound up with the ancestral property doctrine in North Carolina was the question of inheritance by collateral kindred of the half-blood. At common law heirs of the whole blood excluded those of the half-blood principally because such exclusion would promote escheats to the King. As early as 1784 the North Carolina legislature declared that the half-bloods should inherit equally with the whole bloods in the following language:¹⁶ "Whereas it is almost peculiar to the law of Great Britain and founded in principles of the feudal system, which no longer apply to that government and can never apply in this state, that the half-

¹³ *Poisson v. Pettaway*, 159 N.C. 650, 75 S.E. 930 (1912).

¹⁴ N.C. GEN. STAT. § 29-1(5) (1950) [N.C. Laws 1808, ch. 739].

¹⁵ N.C. GEN. STAT. § 29-1(6) (1950) [N.C. Laws 1808, ch. 739, as amended].

¹⁶ N.C. Stat. 465 (Potter's Revisal, 1821).

blood should be excluded from inheritance, the lands of an intestate shall descend to . . . as well those of the half-blood as those of the whole blood, as tenants in common." This law was carried forward into G.S. § 29-1, Rule 6. However, our court held¹⁷ that Rule 6 would have to be construed with G.S. § 29-1, Rule 4, regarding the inheritance by collaterals of ancestral estates, and that collateral relations of the half-blood inherited equally with those of the whole blood only when the former were of the blood of the ancestor from whom the estate was derived.

Thus we see that although the distinction between whole and half-bloods for inheritance purposes had long since been abolished by law, the ancestral property doctrine, when applicable, seriously restricted the right of inheritance by half-bloods. It follows that with the abolition of the latter doctrine by the new law the half-bloods will inherit freely with the whole bloods. North Carolina in this respect now follows the definite movement in America to assimilate the descent of realty to the distribution of personalty which countenanced no such doctrine as that of ancestral property, nor did it discriminate against half-blood collaterals in favor of the whole bloods. The new law should relieve the lawyer from the embarrassment of trying to explain to his baffled client the operation of the old laws—which operation the lawyer himself probably did not completely understand. How could you fully convince an heir that although he was fully capable of sharing in the decedent's personalty, yet he was not of the proper "blood" to inherit part of the realty?

ESTATES OF DOWER AND CURTESY ABOLISHED

G.S. § 29-4 of the new law specifically abolishes the old marital life estates of dower for the wife and curtesy for the husband and in lieu thereof G.S. §§ 29-14 and -21 (the latter with reference to illegitimates) give to the surviving spouse, whether husband or wife, an equal, substantial outright share in fee simple of the decedent spouse's estate. Thus by statute the new law makes the surviving spouse *an heir* of the decedent spouse and gives to such survivor, widow or widower, the *same* intestate share of the decedent's estate. Such share is guaranteed by new G.S. §§ 30-1 through 30-3 which give the survivor, who does not receive one-half or more of the property passing upon the death of a testator, a right to dissent from his or her will and generally to take his or her intestate share as otherwise provided.

However, with the abolition of dower some protection would have to be afforded a wife against the unilateral conveyance by the husband and the consequent depletion by him of his estate, especially with reference to the place of residence, without the wife's joinder. By way of a

¹⁷ *Poisson v. Pettaway*, 159 N.C. 650, 75 S.E. 930 (1912).

compromise statute¹⁸ the legislature provided by new G.S. § 29-30 that the surviving spouse can elect to take a life estate in one-third in value of the real property owned by the deceased spouse during coverture. The usual dwelling house together with the land upon which it is situated and reasonably necessary to its use and enjoyment may be elected even though a life estate therein may exceed the one-third in value specified above. Also included, if the election is made, is fee simple ownership in the household furnishings. Thus if the husband under the new law attempts to sell his realty without his wife's joinder in the deed his vendee will take title thereto subject to his widow's *right of election*—analogous to the situation, which arose under the old law,¹⁹ where the husband's vendee took title to the land subject to the wife's dower right therein. The law of Illinois²⁰ makes similar provision for the spouse's election to take this so-called "dower." The question might validly be asked: Why should the surviving spouse choose a life estate in one-third of the decedent's realty when he or she could take an outright fee therein? The answer lies in the fact that the life estate is not subject to the decedent's debts except those secured by purchase money mortgages or deeds of trust,²¹ while the fee interest is "subject to the payment of the costs of administration and other lawful claims against the estate."²² Naturally, if the estate is insolvent the surviving spouse will choose the valuable life estate. As Professor Rheinstein says:²³ "Such a system of combination affords the highest measure of protection to a surviving spouse not only against disinheritance but also against financial ruin."

Thus we see that North Carolina in abolishing dower and curtesy and, as of July 1, 1960, in giving the surviving spouse as heir an outright portion in fee has finally joined an American parade in this direction which began in the late 1700's. For instance, Vermont in 1797²⁴ abolished dower and curtesy and made outright provision for the surviving spouse; our sister state of South Carolina²⁵ acted similarly in 1791. England and nearly two-thirds of the United States have gone the full distance in making no distinction between the spouses as to the intestate share each should take, whether the property be realty or personalty. The feudal reasons for allowing the first-born son to inherit the father's realty and relegating the widow to a life estate in only one-third thereof, or for depriving the husband of any estate at all in his

¹⁸ This was adopted in lieu of a Homesite Statute proposed by the General Statutes Commission which would have made *void* every conveyance of his realty by the husband without his wife's joinder unless he showed to the clerk of court that the intended conveyance did *not* include the principal place of residence.

¹⁹ N.C. GEN. STAT. § 30-6 (1950) [N.C. Pub. Laws 1868-69, ch. 93, § 35].

²⁰ ILL. REV. STAT. ch. 3, §§ 18-39 (1957).

²¹ N.C. GEN. STAT. § 29-30(g) (Supp. 1959).

²² N.C. GEN. STAT. § 29-13 (Supp. 1959).

²³ RHEINSTEIN, CASES ON DECEDENT'S ESTATES 70 (2d ed. 1955).

²⁴ VERMONT LAWS DIGESTED AND COMPILED TO 1807 131 (1808).

²⁵ *Brevard*, DIGEST OF PUBLIC STATUTE LAW OF SOUTH CAROLINA 422 (1814).

wife's realty if no child was born alive of the marriage, simply no longer should be allowed to influence the right of a surviving spouse to share in the decedent spouse's estate as his rightful heir. And, we must not forget the unfairness that existed under the old North Carolina law in allowing the widower a life estate, as curtesy consummate, in *all* his wife's lands, while the widow was allowed as her dower a life estate in only one-third of her husband's lands, which, if there were no children or their issue surviving, would descend to his brothers and sisters. Dower and curtesy had to go—not only because in a modern society and economy they no longer adequately provided for the support of the surviving spouse but also because they unnecessarily hampered freedom of alienation of land.

DESCENT AND DISTRIBUTION

Share of Surviving Spouse under New Law

In carefully worded language sections G.S. §§ 29-13 and -21 spell out the shares which the surviving spouse whether husband or wife, shall take in an intestate estate. If the surviving spouse is to be treated as a *statutory heir* of the deceased spouse, what proportion of the estate should go to the survivor? Should not a man's widow, who in all probability helped her husband create his estate, or the widower, who may have contributed considerably to his wife's estate, be considered the primary object of the decedent's bounty in the distribution of his estate and receive, therefore, a substantial portion thereof? And should the portion of the surviving parent be cut down in proportion to the number of surviving children of their descendants so that he or she should share *equally* with the children? It will be remembered that in the distribution of *personal property* under the former law²⁶ the surviving parent took only a *child's part* thereof along with the children or their legal representatives.

It will be noted that the new law²⁷ is in keeping with the almost universally accepted principle that the surviving spouse has a greater claim on the estate which he or she helped to create than do lineal or collateral kin. It is so drafted that in no case will the surviving spouse receive less than one-third of the decedent's estate—no matter how many children there may be. He or she will receive one-half if there be only one child or the issue of only one deceased child; if the intestate is not survived by any child or the lineal descendants of any deceased child or by a parent, the surviving spouse takes the *entire* net estate. This provision for the spouse may seem to discriminate against the surviving children

²⁶ N.C. GEN. STAT. § 28-149(1), (2), (8) (1950) [N.C. Pub. Laws 1868-69, ch. 113, § 53, as amended, N.C. Pub. Laws 1913, ch. 166, § 1, as amended, N.C. Pub. Laws 1921, ch. 54, § 1, as amended, N.C. Sess. Laws 1945, ch. 46, § 1].

²⁷ N.C. GEN. STAT. § 29-14 (Supp. 1959).

who are deemed to be the natural heirs of the decedent. However, if such children are minors, the surviving spouse is charged with the duty of supporting and educating them and should be given the means of performing that duty. As has been indicated, under the old law if a man died leaving a widow and nine children and the average estate of \$10,000 consisting mainly of personalty, his widow would take a child's part thereof—one-tenth, or \$1,000—and still would have to support nine children. As Professor Wiggins has so well said:²⁸ "It hardly seems reasonable to cut down the means of adequately discharging the duty to support in proportion to the increase in the duty"

The inequity of this law was magnified in the case where the surviving spouse, the children no longer being minors, was advanced in age, and was faced with rising living costs and possible medical and hospital care.

The General Statutes Commission in its report to the legislature followed the drafting committee's recommendation that, e.g., "if the intestate is survived by two or more children . . . [the surviving spouse should take] \$5,000 in value or one-third of the net estate whichever is greater." Such a provision, if it had been adopted would have given the entire estate of the decedent to the surviving spouse if the net estate did not exceed \$5,000. Thus in the case of small estates the spouse might take all for the support of herself and the children, and whatever small shares, under the old law, the minor children would have taken and would have been dissipated by guardianship costs would in effect be preserved. The legislature, perhaps because of possible administrative difficulties foreseen by it, struck out the monetary provision and simply gave the surviving spouse one-third interest in the realty and one-third of the personalty of the decedent spouse in the case put. However, the new law which gives to the surviving spouse a substantial outright share of the real and personal property of the decedent definitely follows the modern trend of distribution both in this country and in England.

Descendants, Ascendants and Collaterals

In setting up a hierarchy of inheritance the new law places the surviving spouse first in line; then follow the children or their lineal descendants; if there be no surviving spouse or children or lineal descendants of a deceased child or children, the surviving parent or parents take.²⁹ If a surviving spouse, children or their descendants, or parents fail to materialize as takers, then the property goes to the intestate's brothers and sisters or their descendants; and if none of the latter, it

²⁸ Special Report of the General Statutes Commission on an Act To Rewrite the Intestate Succession Laws of North Carolina, at 18 (Feb. 16, 1959).

²⁹ N.C. GEN. STAT. §§ 29-14, -15 (Supp. 1959).

ascends to the grandparents of the decedent; then to his uncles and aunts; then to his cousins.³⁰ It will be noticed that this sets up, roughly, a parentelic scheme of inheritance for North Carolina.

Fixing the preferential rights of spouses and children gives little trouble in establishing a scheme of inheritance. Some difficulty is encountered (1) when, absent surviving children or their descendants, we have competing for shares in the decedent's estate his spouse *and* his parent or parents; or (2) if there be no spouse or children, surviving parents are competing with the decedent's brothers and sisters for priority of treatment. The new law³¹ answers the first problem by letting the surviving spouse take one-half of the realty and \$10,000 plus one-half of the remainder of the personalty. This definitely favors the spouse—especially if the estate is small. As to the second, the new law³² allows the parents to take in preference to the brothers and sisters. This changes the old law as to realty which preferred the collateral brothers and sisters to the ascendant parents.³³ In favor of the change it was reasoned that the decedent's affection for his parents would be greater than that which, because of the more distant relationship, he would have for a brother or sister; and that the aged or aging parent would be in greater need of help from the deceased child's estate than would the latter's brothers and sisters who, being younger, would be more able to fend for themselves. "During recent decades there has been a strong trend to give the parents priority over brothers and sisters."³⁴

SUCCESSION—LIMITATION ON SUCCESSION BY COLLATERALS

While the new law places no limitation on the right of succession by the lineal descendants of an intestate,³⁵ it does provide³⁶ that

there shall be no right of succession by collateral kin who are more than five degrees of kinship removed from an intestate; provided that if there is no collateral relative within the five degrees of kinship referred to herein, then collateral succession shall be unlimited to prevent any property from escheating.

The purpose of this latter section, as it was submitted to the legislature *without the qualifying proviso*, was to prevent an intestate's estate from being cut up into infinitesimal parts among his more remote collateral kindred whose consciousness of kinship with the decedent was likely to be correspondingly remote. Its aim was to cut off the right of inheritance by a "laughing heir" or, as I have dubbed him, "a windfallee." It de-

³⁰ N.C. GEN. STAT. § 29-15 (Supp. 1959).

³¹ N.C. GEN. STAT. § 29-14(3) (Supp. 1959).

³² N. C. GEN. STAT. § 29-15(3), (4) (Supp. 1959).

³³ N.C. GEN. STAT. § 29-1(6) (1950) [N.C. Laws 1808, ch. 739, as amended].

³⁴ 6 POWELL, *op. cit. supra* note 7, at 633.

³⁵ N.C. GEN. STAT. § 29-6 (Supp. 1959).

³⁶ N.C. GEN. STAT. § 29-7 (Supp. 1959).

parts from the old law³⁷ which permitted unlimited right of representation by collateral kin of an intestate. Under this section the cut-off point for collateral kin of the decedent who inherit through his brothers or sisters would be with the decedent's great-grandnieces and nephews; and for his collaterals inheriting through his uncles and aunts, the terminal point would be the decedent's cousins once-removed, or, as they are sometimes denominated, his second cousins. That there should be no taking by collaterals beyond the fifth degree cut-off point seems desirable in view of the modern loosening of ties of kinship; that the property should escheat to the state to be applied to growing social needs rather than go to the grinning windfallee is reasonably arguable. However, under the proviso interpolated by the legislature, the blood-is-thicker-than the State of North Carolina feeling prevailed and, if there are collaterals beyond the fifth degree, they are allowed to take to prevent an escheat of the decedent's property. In passing, it might be noted that Kansas,³⁸ in 1939, restricted collateral inheritance to persons within the sixth degree of kinship.

DISTRIBUTION AMONG CLASSES

New G.S. § 29-16, which provides for the distribution of the intestate's property among classes, represents a somewhat radical departure from the old law and gives us perhaps the most novel feature of the new Intestate Succession Act. Its purpose is to provide for a more equitable distribution of a decedent's estate than has hitherto been afforded, among classes of his relatives, lineal or collateral, and among the lineal descendants of deceased members of such classes. It materially changes the old North Carolina law³⁹ which provided that the descent of realty should be on a strict per stirpes basis both to lineal descendants and collateral kindred (whether or not the claimants were of equal or unequal degree of consanguinity with the decedent) and that personalty should be distributed per capita with representation, *i.e.*, if those entitled to take were all equally related to the intestate then the division should be per capita, but if it were necessary to bring the claimants to equality as next of kin, the division should be per stirpes.⁴⁰ The new law in effect provides that all property will be distributed per capita to all persons in equal degree. To effectuate this end it spells out a series of rules by which calculations of the shares of children, grandchildren, brothers, nephews, etc., are to be determined. To illus-

³⁷ N.C. GEN. STAT. § 29-1(3), (5) (1950) [N.C. Laws 1808, ch. 739]; Johnston v. Chesson, 59 N.C. 46 (1860) (dictum).

³⁸ KAN. GEN. STAT. ANN. § 59-509 (1949), enacted by Kan. Laws 1939, ch. 180, § 31. For further discussion of inheritance by collaterals and restrictions thereon, see 6 POWELL, *op. cit. supra* note 7, 637, 640.

³⁹ N.C. GEN. STAT. § 29-1(3) (1950) [N.C. Laws 1808, ch. 739]; Clement v. Cauble, 55 N.C. 82 (1854).

⁴⁰ Ellis v. Harrison, 140 N.C. 444, 53 S.E. 299 (1906).

trate its operation let us use a hypothetical example. Assume that *P* dies intestate owning an estate worth \$90,000. Assume further that he is survived only by a brother *X*; by nephews *A*, *B*, and *C*, children of a deceased brother *Y*; and by nephew *D*, only child of a deceased brother, *Z*. Under the old North Carolina law, surviving brother *X* will receive \$30,000 as his intestate share. Nephews *A*, *B*, and *C* will represent their deceased father *Y*, and each will receive \$10,000 as his share; nephew *D* will represent his deceased father *Z* and receive \$30,000 as his intestate share. Under the new law brother *X* will still receive \$30,000 as his intestate share, but the remaining \$60,000 will be distributed in equal shares of \$15,000 each to nephews *A*, *B*, *C*, and *D*. We think this is the distribution of his estate the intestate himself would have wanted. We could hardly attribute to him a desire to discriminate among his nephews related to him in equal degree and give to nephew *D* three times as much as nephew *A* got simply because *D* happened to be an only child. While the operation of new G.S. § 29-16 will be discussed later in greater detail by Professor Wiggins, briefly stated our purpose in drafting it was to provide that the surviving persons in the degree nearest the intestate should take the same shares which they would have received under the old recognized rule but to provide that all the property which would have gone to deceased members in that degree should go *as a unit* to all persons surviving them in the next degree and be divided per capita among such persons. It is believed that the new law will, in departing from the old strict per stirpes and per capita with representation doctrines, provide a more equitable basis for the distribution of an intestate's property.

ILLEGITIMATES

With regard to the inheritance rights of illegitimate children the new law seeks to remove further the stigma of the bar sinister by increasing or improving on those rights. Under the law as it formerly stood⁴¹ an illegitimate child could not inherit *through* its mother from her relatives; nor, if its mother left both legitimate and illegitimate children, could the illegitimate inherit from her any property which came to her from the father of the legitimate children. Under the new law, G.S. § 29-19, the illegitimate is, for purposes of intestate succession, treated as if he were the legitimate child of his mother so that he and his lineal descendants may take by, through and from his mother and his other maternal kindred, and they in turn are allowed to inherit from him. Thus the illegitimate for inheritance purposes is placed completely within the family of the natural mother. Unless under new G.S. § 29-18 the child

⁴¹ N.C. GEN. STAT. §§ 29-1(9), (10), 28-152 (1950) [N.C. Pub. Laws 1913, ch. 71 § 1; N.C. Sess. Laws 1945, ch. 520, § 1; N.C. Pub. Laws 1868-69, ch. 113, §§ 57, 58].

is legitimated by the father according to the applicable law of this or any other jurisdiction, the illegitimate does not inherit from or through his putative father, nor does the latter from him. The matrilineal pattern of succession is further followed in new G.S. §§ 29-21 and -22 as to intestate succession *from* an illegitimate person by making the mother and her family his intestate successors in the absence of a surviving spouse or lineal descendants. Thus is recognized the fact that the illegitimate most likely will have been nurtured and befriended by his mother and her family rather than by his father or his family.

The drafting committee, in an attempt to enlarge the right of an illegitimate to inherit from its putative father, tentatively proposed a statute that would have permitted such inheritance if the paternity should be established by a court of competent jurisdiction in determining the putative father's responsibility for the non-support of his illegitimate child. Objections, however, were made to this proposal on the ground that such proceedings and hence findings of paternity would generally be instituted and made in the lower and inferior courts of the state—too shaky a foundation upon which to establish inheritance rights. The proposal died "aborning."⁴²

ADOPTED CHILDREN

With reference to succession by, through, and from adopted children, the new intestacy act, G.S. § 29-17, retains, with only one change, all the excellent features of the old law.⁴³ For inheritance purposes, a child upon adoption is taken completely out of the blood stream of his natural parents and put into the blood stream of his adoptive parents. Complete transplantation takes place and all blood ties between the adopted child and his natural parents are severed. However, under the new law⁴⁴ it is provided that if the natural parent of the child has previously married, is married to, or shall marry an adoptive parent, the adopted child is still considered the natural child of such natural parent for *all* purposes of intestate succession. It seemed logical under such circumstances to put the adopted child back into the bloodstream of the natural parent and thus restore, reciprocally, the rights of inheritance inherent in such relationship.

⁴² Entirely aside from this, perhaps someday in freeing the illegitimate from the sins of its parents we may become civilized enough to legislate, as did Arizona, that: "Every child shall inherit from its natural parents, and from their kindred heir [sic], lineal and collateral, in the same manner as children born in lawful wedlock." ARIZ. REV. STAT. ANN. § 14-206 (1956). *Accord*, ORE. LAWS 1957, ch. 411, §§ 1, 3.

⁴³ N.C. GEN. STAT. §§ 28-149(10), (11), 29-1(14), (15) (1950) [N.C. Sess. Laws 1947, ch. 879, § 1; N.C. Sess. Laws 1947, ch. 832].

⁴⁴ N.C. GEN. STAT. § 29-17(e) (Supp. 1959).

ADVANCEMENTS

The new law concerning advancements⁴⁵ makes some changes in the old law. However, it does retain and codify some of the present case law. It will be noticed that the new act broadens the doctrine of advancements to make it apply to inheritance-anticipating gifts by the intestate donor to *any person* who would be his heir or one of his heirs upon his death.⁴⁶ This definitely departs from the old law whereby advancements were restricted to gifts from a *parent* to a *child*,⁴⁷ which law was derived from the English Statute of Distributions.⁴⁸ This change in the law was predicated on the thought that while most advancements will be made to the child or grandchild of the donor, there is no good reason why the more remote kin should not account for gifts made to them if they too should be heirs of the intestate.

The doctrine of advancements complicates the distribution of an intestate's property under the applicable intestacy law. The doctrine itself is difficult to apply because what constitutes an advancement is said to rest upon the *intention* of the advancer,⁴⁹ and, under the former law,⁵⁰ rebuttable presumptions were resorted to in determining whether or not an advancement was intended. G.S. § 29-24 of the new law alleviates this difficulty by providing that a gratuitous inter vivos transfer is presumed to be an *absolute gift* and not an advancement unless shown to be an advancement. This puts the burden of proof to that effect squarely upon the person who claims that an advancement has been made. As to a spouse who has become an heir of the decedent spouse under the new law, new G.S. § 29-2(1) expressly provides that no gift to a spouse shall be considered an advancement unless designated *in writing* to be such. This definitely restricts the doctrine as it might apply to spouses. If the requirement of a writing should be applied to *all* advancements for their validity, the difficulty of proof now encountered would be almost completely eliminated. However, the new law does not go that last mile.

CONCLUSION

In this paper we have tried to point out the major changes in the law made by North Carolina's New Intestate Succession Act—the history of the struggle to bring about those changes and the philosophy

⁴⁵ N.C. GEN. STAT. §§ 29-2(1), -23 to -29 (Supp. 1959).

⁴⁶ N.C. GEN. STAT. § 29-2(1) (Supp. 1959).

⁴⁷ N.C. GEN. STAT. §§ 28-150, 29-1(2) (1950) [N.C. Pub. Laws 1868-69, ch. 113, § 54; N.C. Laws 1808, ch. 739, as amended]; *Parker v. Eason*, 213 N.C. 115, 195 S.E. 360 (1938).

⁴⁸ 1670, 22 & 23 Charles 2, c. 10, § 3.

⁴⁹ *Nobles v. Davenport*, 183 N.C. 207, 111 S.E. 180 (1922).

⁵⁰ *Nobles v. Davenport*, *supra* note 49; *Kiger v. Terry*, 119 N.C. 456, 26 S.E. 38 (1896).

upon which those changes are predicated. The new act is not beyond the pale of criticism; some flaws in it will turn up which will have to be cured by construction or by amendment. However, by virtue of its enactment we believe that a better and fairer day has dawned for those who take property by intestate succession in North Carolina and that those persons who die intestate after July 1, 1960, can rest quite comfortably in their graves pacified by the assurance that the legislature has made a pretty fair "will" for each of them in the disposition of their property.